665-D

UNITED STATES

v.

JOHN C. CHAPMAN ET AL.

A-30581 Decided JUL 16 1968

Mining Claims: Discovery

To satisfy the requirements of discovery on a placer mining claim located for cinders prior to July 23, 1955, it must be shown that the deposit could, prior to that date, have been extracted, removed and marketed at a profit, and where the only evidence of marketability at a profit is a showing that thousands of tons of cinders were removed by others with the permission of the claimants at no cost above actual operating expenses to the users the claim is properly declared null and void.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-30581

: Arizona Contest No. 10547

United States
v.
John C. Chapman et al.

: Placer mining claim
: declared null and void

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John C. Chapman, Floyd Barker, T. H. Young, A. L. Chadwick, George E. Lang, Henry Beide and Mrs. Ruth R. Thomas, executrix of the estate of Earl Thomas, have appealed to the Secretary of the Interior from a decision dated December 6, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner declaring null and void the Contention placer mining claim in section 14, T. 21 N., R. 9 E., G.S.R. Mer., Coconino National Forest, Arizona.

Upon the recommendation of the Forest Service, United States Department of Agriculture, the validity of the claim was challenged in a proceeding initiated by the filing, on February 6, 1963, of a complaint in which it was charged:

> "1. That a valid mineral discovery, as required by the mining laws of the United States, does not exist within the limits of the Contention placer mining claim.
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> 2. That as of July 23, 1953, no discovery of valuable mineral sufficient to support a mining location has been made within the limits of the Contention placer mining claim.
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> 3. That the land embraced within said claim is nonmineral in character.
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> 4. That the $SW\frac{1}{4}SE\frac{1}{4}SE\frac{1}{4}$, $SE\frac{1}{4}SW\frac{1}{4}SE\frac{1}{4}$ of Section 14, T. 21 N., R. 9 E., was closed to mineral entry for cinders between December 4, 1943 and August 30, 1960."

A hearing was held at Phoenix, Arizona, on November 19, 1963, to resolve

the issues raised by the charges of the complaint.1/

There appears to be no significant dispute as to the facts of the case. The record shows that the Contention mining claim was located on September 5, 1953. (Tr. 34.) Prior to the location of the mining claim, a special use permit was issued by the Forest Service on December 4, 1943, to the Arizona Highway Department for the use of a portion of the area embraced by appellants' mining claim "for the purpose of removing road construction material for F.A.P. 81-C." (Tr. 12-16, Ex. 7.) The area embraced in the special use permit was opened as a cinder pit in 1946, and cinders were removed from the pit in 1946 and 1947 for use in the construction of U.S. Highway 66. (Tr. 78-79.)

Angus L. Chadwick, Deputy State Engineer of the Arizona Highway Department and one of the locators of the mining claim, testified that cinders were removed from the claim between 1953, when the claim was located, and 1955, with the consent of the mining claimants, for use in highway construction and that cinders have also been removed by small contractors who hauled them to Winslow, approximately 45 miles from the claim site. (Tr. 38-41.) No remuneration was received by the mining claimants for any of the cinders removed from the claim. (Tr. 53.) The cinders taken from the claim have been used only in highway, street and driveway construction, and it is undisputed that they are a common variety of mineral not subject to location after July 23, 1955. (Tr. 56-57.)

John B. Hoskins, a consulting engineer who testified in behalf of the appellants, stated that, in his opinion, the material found on the claim is of commercial value because of the quality of the material and the use made of it. (Tr. 71, 74-75.)

Arthur W. Rogers, general superintendent for Tanner Brothers, who opened the cinder pit in 1946, testified that the material found on the claim was commercially valuable and was marketable between September 5, 1953, and July 10, 1955, because it was used in highway construction. (Tr. 83, 89.)

By a decision dated April 7, 1964, the hearing examiner rejected the Government's contention that the special use permit issued in 1943, without a specified termination date, remained in effect as a withdrawal of the land described therein until August 30, 1960, when the Forest Service closed the case in its files (see Tr. 15-18, Ex. 8), thereby precluding location of a mining claim on that land in 1953. Rather, he found that the withdrawal effect of the permit terminated upon the completion of Federal Aid Project 81-C in 1947 and that the land was thereafter open to mineral location. He concluded, however, that the mining

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1/ The third allegation of the complaint was dismissed at the hearing by agreement of the parties to the contest. (Tr. 2.)

claim was null and void for lack of a discovery of a valuable mineral deposit sufficient to support a mining location, finding that the only qualifying use of the cinders from the claim was as an aggregate for road surfacing 2/ and that the available deposits in the area of the claim far exceeded the market for their use, there being millions of tons of cinders left on the claim and even greater supplies on both private and public lands in the immediate area. He observed that the claim is in an accessible location along a main highway and that, in all probability, the deposit will be used before other less accessible deposits but that the contestees did not establish that users of cinders would buy the material from the claim before using the other available deposits.

In affirming the hearing examiner's decision the Office of Appeals and Hearings rejected appellants' contention that the validity of the claim was established by the testimony of witnesses who stated that the cinders on the claim were commercially valuable, noting that the opinions of the witnesses were unsupported by the facts adduced through the testimony of the same witnesses. It also dismissed appellants' charge that the testimony of the Government's witness, a mining engineer employed by the Forest Service, was incompetent, stating that appellants did not point out wherein his testimony was deficient or wrong on its face. It declined to receive as evidence three documents dated in 1964 and 1965 which were offered by appellants in their appeal to the Director as evidence of a market for material from the claim. These documents, the Office of Appeals and Hearings stated, alluded to a possible future market for the material but did not show marketability prior to July 23, 1955, a showing that was necessary to warrant any change in the hearing examiner's decision.

In their appeal to the Secretary appellants again contend that the finding that the material found on the Contention mining claim was not marketable prior to July 23, 1955, is contrary to the evidence and that it "does not take into consideration the legitimate factors of marketability, which, if considered, would dictate a finding that the Contention placer mining claim is valid in all respects." They assert that the record is replete with testimony to the effect that great quantities of material were removed from the claim prior to July 23, 1955, by persons other than the locators and that the removal of such material was considered as labor performed and improvements

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2/ The examiner pointed out that material used as fill has never qualified as a mineral subject to location under the mining laws. United States v. Black, 64 I.D. 93 (1957), and cases cited; Associate Solicitor's opinion M-36295 (August 1, 1955). The examiner found that the cinders from the claim have been used as fill and borrow as well as for road surfacing, but the amounts or proportions so used do not appear in the record.

made on the claim. In view of the fact that none of the cases called to their attention by the contestant hold that a "sale" must be supported by an exchange of cash consideration before it can legitimately be characterized as a bona fide sale, appellants argue, marketability prior to July 23, 1955, has been conclusively demonstrated by uncontradicted evidence showing an exchange of material for valuable work done.

Appellants' arguments are not acceptable for a basic reason. But first let us consider what constitutes the test of marketability.

The Department has long employed the test of marketability as one of the criteria for determining whether or not a valuable mineral deposit has been discovered. That is, in order to be valuable, minerals must be marketable at a profit. This test has received judicial sanction as a proper complement to the long-accepted prudent man test of discovery enunciated in Castle v. Womble, 19 L.D. 455 (1894), and approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and subsequent decisions. United States v. Coleman, 390 U.S. 599 (1968); Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959). It is not enough to show that a market exists for a particular mineral, but it must be shown that the particular deposit itself which is claimed to be valuable can be mined and marketed at a profit. See United States v. Gene DeZan et al., A-30515 (July 1, 1968), and cases cited. Moreover, where the deposit is of a common variety of mineral removed from location under the mining laws by section 3 of the act of July 23, 1955, as amended, 30 U.S.C. § 611 (1964), as is the case here, it must be shown that mineral from the deposit could have been extracted, removed and marketed at a profit prior to July 23, 1955. United States v. E. J. Fife and Eugene M. Fife, A-28366 (September 19, 1960); United States v. Alfred Coleman, A-28557 (March 27, 1962), affirmed in United States v. Coleman, supra; United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965).

Although appellants assert in their appeal that "the deposit within the Contention placer mining claim is of such value that it can be mined, removed and disposed of at a profit," they have, in fact, completely ignored profit as an element of marketability. They have rested their case simply on the proposition that they have exchanged material for valuable work done and that this established marketability prior to July 23, 1955.3/ However, in claiming constructive receipt of

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3/ In an Affidavit of Labor Performed and Improvements Made, filed in Coconino County, Arizona, on June 30, 1954 (Ex. A), appellants alleged the expenditure of at least $5000 in work and improvements on the claim between September 5, 1953, and June 30, 1954, such work and improvements having consisted of "removal by W. J. Henson, Contr. of 27,616.7 tons of material and removal by Vinnell Co., Inc. of 68,937.85 tons of material; and construction of approximately one mile of haul roads." This "exchange"

an amount equal to the value of work performed on the claim in the removal of cinders, appellants have overlooked the fact that, simultaneously, they constructively spent the same amount in having the work done. The fact that expenses incurred in actual mining operations are creditable as expenditures for assessment work does not change their nature from expenses to profits. When appellants' constructive expenses are set against their constructive receipts, the balance is zero. This balance represents the actual, as well as the theoretical, profit which appellants have derived from mining operations conducted on their claim. In short, appellants have shown that the cinders on the claim are worth the cost of extracting them and transporting them to the places where they are utilized. However, unless something more than this cost can be realized there is no profit, and appellants do not purport to show the receipt of more.

As the Office of Appeals and Hearings has already indicated, the fact that no cinders were actually sold from the claim prior to 1955 does not necessarily establish the absence of a market for the cinders during the critical period. However, there is not an iota of evidence in the record that cinders from the claim could have been profitably marketed during that time. The testimony of appellants' witnesses that the cinders were commercially valuable prior to July 23, 1955, was not evidence to that effect since the witnesses thought commercial value existed simply because the cinders were used in highway construction. Although there was testimony as to what prices were being paid for classes of material such as that found on the claim, there was no relating of prices to costs of extraction, hauling, etc. which would demonstrate that the material could have been sold at a profit. To be sure, there is evidence that there is a market for cinders in Arizona (see Tr. 62, 82-83), but evidence that cinders have been sold from some deposits in the State or may be sold today is not evidence that cinders from the Contention claim were marketable between 1953 and 1955. The want of evidence of a profitable market for these cinders, coupled with evidence that thousands of tons of cinders have been removed from the claim with the claimants' permission at no expense to the removers above their own operating cost and with appellants' acknowledgment that they have never received any remuneration from the sale of cinders, is sufficient to sustain the finding of the hearing examiner and of the Office of Appeals and Hearings that the discovery of a valuable mineral deposit has not been shown.

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footnote 3 continued

of material for labor is viewed by appellants as the equivalent of a sale.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

Ernest F. Hom

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Land Appeals